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APR 29 1992

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 92-13
Tariff Filing Requirements for	)	
Interstate Common Carriers	)	

REPLY COMMENTS OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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SUMMARY

The comments of those who support the Commission's "forbearance" policy do not refute AT&T's showing that this proceeding is governed by the mandatory rate filing requirements of Section 203 which simply cannot be waived by the Commission. Contrary to the arguments of these commenters, neither the Commission's "discretion" under Section 4(i), nor its modification power under Section 203(b), permits conduct that is expressly prohibited by the Act (i.e., the provision of service at unfiled rates). Indeed, this conclusion is not merely required by the unequivocal language of the statute, it is precisely the holding of controlling Supreme Court and appellate decisions. There is likewise no basis in the statute or the relevant case law for the claim of some commenters that Congress has somehow "ratified" the Commission's abandonment of the Section 203 filing requirements.

Many commenters therefore fall back on various policy arguments which, they claim, support continued forbearance. These arguments are not only immaterial to the pure legal issue raised under Section 203, they are

misplaced. AT&T shares customer concerns that unnecessary regulation which distorts competition or disrupts customers' business dealings be avoided. The mere filing of carrier rates, however, as Section 203 mandates, has not diminished, and should not impair, carriers' responsiveness to customer demands in today's competitive long distance business. The concern of some carriers that compliance with Section 203 could impose needless costs is likewise misplaced. It is other Commission regulatory rules, such as the intrusive advance review of tariffs and cost support requirements -- rules that disproportionately or uniquely affect AT&T and its customers -- that are by far the principal cause of needless regulatory costs and delays. These rules are well within the Commission's discretion to eliminate, unlike the statutory rate filing requirement.

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American Telephone and Telegraph Company ("AT&T") hereby submits its reply comments on the Notice of Proposed Rulemaking in CC Docket No. 92-13, released January 28, 1992 ("Notice").*

The threshold issue in this proceeding is the "lawfulness" of a "forbearance policy" which, as now defined by the Commission, purports to remove the rate filing requirements of Section 203 for "nondominant" carriers. As AT&T demonstrated in its initial comments, this issue is strictly one of statutory construction as to which there is no reasonable doubt. Under the plain terms of the Communications Act, all common carriers may provide common carrier services <u>only</u> pursuant to rates, terms and

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* <u>In the Matter of Tariff Filing Requirements for Interstate Common Carriers</u>, Notice of Proposed Rulemaking, CC Docket No. 92-13, FCC 92-35, released January 28, 1992. A list of other parties submitting comments in this proceeding, and the abbreviated designations used herein, is attached as Appendix A.

conditions that are filed with the Commission. The decisions of the Court of Appeals in MCI v. FCC and the Supreme Court in Maislin completely foreclose any contrary view,* as even AT&T's competitors have elsewhere conceded when it has suited their purposes.

A number of commenters, including AT&T's competitors, contend that forbearance is proper as a matter of law and policy. Their legal arguments all reduce to the untenable claim that the Commission has unfettered discretion to exempt common carriers from the mandatory provisions of Section 203. MCI v. FCC and Maislin hold precisely to the contrary, and cannot be distinguished. These commenters therefore also rely on claims that forbearance is "good policy" because it encourages entry and innovation, and enables carriers to eliminate or reduce unnecessary costs. The merits of

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* See Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2765-71 (1990) ("Maislin"); MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191-96 (D.C. Cir. 1985) ("MCI v. FCC"). This is why AT&T filed a formal complaint against MCI alleging violations of Section 203, and why AT&T has sought review in the Court of Appeals of the Commission's decision to dismiss that complaint. As recent activity confirms, the selective use by MCI of secret, unfiled deals which prompted AT&T's complaint has not abated. Indeed, MCI has recently offered to provide its domestic Vnet and 800 Dedicated Termination Services to a large business customer at rates (and under a rate structure) that are radically different from those contained in its tariffs. In particular, AT&T understands that MCI has offered to provide these services to the customer at a postalized rate of less than 6.4 cents per minute.

forbearance as a policy matter, however, are simply irrelevant to its lawfulness, as MCI v. FCC and Maislin likewise make clear. Although the Commission can and should continue to forbear from imposing costly and unnecessary requirements (such as the filing of "cost support" material, and many other aspects of "dominant" carrier regulation) that are not mandated by the Act, the Commission cannot, for any reason, exempt common carriers from the rate filing requirement of Section 203.

I. THE COMMISSION HAS NO "DISCRETION" TO FORBEAR FROM REQUIRING WHAT THE ACT MANDATES.

Those commenters that support forbearance argue that Sections 203(b)(2) and 4(i) of the Act authorize the Commission to forbear from the filing requirements of Section 203(a), that such forbearance is made lawful by virtue of the Commission's finding that nondominant carriers lack market power, and that Congress somehow "ratified" forbearance and the interpretation of the Act upon which it is based through the Telephone Operator Consumer Services Improvement Act ("TOCSIA") and otherwise. All of these arguments are meritless.

A. MCI v. FCC and Maislin Establish Beyond Dispute That Forbearance Is Unlawful.

Although language in Sections 4(i) and 203(b) affords the Commission discretion to adopt or modify regulatory requirements in certain circumstances, it does not provide the Commission with unfettered discretion to authorize conduct that is expressly prohibited by the Act. To the contrary, Sections 4(i) and 203(b) authorize only agency action that "is not inconsistent with" the other provisions of the Act,* including Section 203.**

Indeed, it was precisely on this basis that the court in MCI v. FCC rejected the Commission's analogous argument that its "mandatory" forbearance policy was permissible under Sections 203(b)(2) and 4(i).*** As the court explained, Section 203(b)(2) permits "circumscribed alterations," not the "wholesale abandonment" of the Act's filing requirement. 765 F.2d at 1192. Whatever "general

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* See 47 U.S.C. § 154(i); AT&T v. FCC, 487 F.2d 865, 876, 879 (2d Cir. 1973). GTE's suggestion that Section 4(i) authorizes Commission action that may appear to be prohibited by other Sections of the Act is incorrect. The case upon which it relies, North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985), characterized the Commission action there under review as a "limited power" and expressly noted that Section 4(i) "could not properly be used . . . to contravene another provision of the Act." Id. at 1292.

** AT&T v. FCC, 487 F.2d at 876, 879.

*** See AT&T's Comments, pp. 4-5. Some commenters (e.g., FFMC, pp. 5-6; GTE, pp. 15-16, ICA, p. 3) also contend that forbearance is permissible under Section 211(b) of the Act, which authorizes the Commission to require the filing of contracts other than those between carriers (see Section 211(a)), and to exempt from any such filing requirement "minor" contracts. No commenter explains, however, how a provision that permits the filing of certain contracts could possibly be construed to authorize carriers to provide service pursuant to unfiled agreements.

authority" the Commission may possess to adapt its regulation to the public interest "provide[s] no warrant for erasing the congressional instruction in section 203(a) that _every_ common carrier _shall_ file tariffs." _Id._ at 1193 (emphasis in original).

The _MCI_ court also rejected the argument, repeated here by some commenters, that forbearance is legally justified by the Commission's findings that nondominant carriers lack market power and that, accordingly, tariffs are not needed to enforce the substantive provisions of Title II. In particular, the court held that the Commission finding that "competitive marketplace forces in almost all cases will assure just and reasonable prices . . . [h]owever reasonable, [cannot] release the agency from the tie that binds it to the text Congress enacted." _Id._ at 1194. As the Court concluded, "if the Commission is to have authority" to decide that carriers need not file tariffs, "the authorization must come from Congress, not from . . . the Commission's own conception of how the statute should be rewritten in light of changed circumstances." _Id._

The Supreme Court squarely reaffirmed these same conclusions in _Maislin_. The ICC had premised the Negotiated Rates policy at issue in _Maislin_ on its finding "that in light of the more competitive environment, strict adherence to the filed rate doctrine 'is inappropriate and unnecessary to deter discrimination today.'"* The Court "reject[ed] this argument," and held that ICC findings as to the likelihood of discrimination did not permit the agency "to adopt a policy that directly conflicts with its governing statute" or "alter the well-established statutory filed rate requirements." 110 S. Ct. at 2770. As the Court stated, "[i]f strict adherence to [statutory rate filing requirements] has become an anachronism . . ., it is the responsibility of Congress to modify or eliminate" them. Id. at 2771.

The attempts of some commenters to distinguish MCI v. FCC on the ground that it involved mandatory instead of permissive "detariffing" are frivolous.** The court's holding that the tariff requirements imposed by

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* Maislin 110 S. Ct. at 2770, quoting NITL - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99, 106 (1986).

** See, e.g., MCI, p. 14; Sprint, p. 7; CompTel, p. 8. The assertion of this argument by AT&T's competitors is highly ironic. Each of them has recognized in other proceedings that MCI v. FCC is not limited to mandatory detariffing, but in fact establishes that the Commission has no authority to exempt common carriers from the provisions of Section 203(a). For example, in CC Docket No. 90-132, Sprint argued that MCI v. FCC "confirm[ed]" that the Commission's "discretion under Section 203(b) is limited," and that "Section 203(b)(2) does not authorize the Commission to eliminate the tariffing requirement." Comments of US Sprint, CC Docket No. 90-132, pp. 101-02. CompTel went even further and argued that the Commission's proposal to adopt maximum streamlining "is precisely the same abandonment of the FCC's statutory responsibilities that the MCI court condemned." Comments of CompTel, CC Docket No. 90-132, p. 135.

Section 203(a) are mandatory for all common carriers and that Section 203(b)(2) does not give the Commission discretion to exempt carriers from such requirements applies equally to permissive forbearance.* No commenter shows otherwise. The assertion of MCI (p. 14) and GTE (p. 13) that permissive (as opposed to mandatory) detariffing "does not mean the elimination of tariffing" misses the point; by its terms, MCI v. FCC is concerned with the tariff filing requirement, not the extent to which carriers might choose to file tariffs absent a legal compulsion to do so. Permissive detariffing, no less than mandatory detariffing, is "the wholesale abandonment or elimination of [the tariff filing] requirement," and "eras[es] the Congressional instruction in Section 203(a) that every common carrier shall file tariffs." In sum, the construction of the statute rendered by the court in

* Contrary to the suggestion of some commenters, the question the Court reserved in MCI was not whether Section 203 requires the filing of tariffs. It was whether the FCC enforcement policy adopted in the Fourth Report in the Competitive Carrier proceeding could ever itself be directly challenged. Because the Fourth Report was a decision "not to take enforcement action," the Court stated it was "arguably immune from judicial review," but the Court noted the FCC "policy" might nonetheless be challenged on the ground that it was "'so extreme as to amount to an abdication of [the FCC's] statutory responsibilities.'" MCI v. FCC, 765 F.2d at 1190-91 n.4 (citations omitted). That is the question that the Court did not reach. Id.

MCI v. FCC is completely dispositive of the legal issues here, and compels a holding that permissive forbearance is unlawful.*

The attempts of some commenters to distinguish Maislin are likewise frivolous. They argue that Maislin merely prohibits a carrier from charging a rate different than that contained in a tariff, and does not apply to services for which the carrier has filed no tariff whatsoever.** This claim overlooks completely the language and purpose of the statutory provisions on which the Court relied. Maislin emphatically reaffirms that the Interstate Commerce Act ("ICA"), like the Communications Act, requires common carriers to file all of their rates, and "specifically prohibits" a carrier from providing service at rates which have not been filed.*** As the Court explained:

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* Contrary to Ad Hoc's suggestion (p. 9), the court's statement (765 F.2d at 1190) that mandatory detariffing "fundamentally altered the forbearance program" had nothing to do with the merits of MCI's appeal or the issues of statutory construction before the court. Rather, the court's statement was concerned only with the timeliness of the appeal, and whether MCI had previously been sufficiently "aggriev[ed]" to challenge forbearance. Id.

** See, e.g., MCI, pp. 19-21; Sprint, pp. 6-8; Ad-Hoc, pp. 8-9; FFMC, p. 7.

*** 110 S. Ct. at 2762. Indeed, the Court began its discussion of the merits with the observation that Section 10762 of the ICA "requires a motor common carrier to publish its rates in a tariff filed with the Commission" (id. at 2765), and concluded its analysis by reaffirming that the ICC had no authority to exempt motor common carriers from this requirement (id. at 2770-71).

> "If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart . . . . The Act has provided for the establishing of one rate, to be filed as provided, and that rate to be while in force the only legal rate."*

The Court concluded that "by sanctioning adherence to unfiled rates," the ICC's Negotiated Rates policy "undermine[d] the basic structure of the Act." 110 S. Ct. at 2769. This conclusion applies with even greater force to the Commission's forbearance policy, which purports to permit nondominant carriers to provide service at secret, unfiled rates in any and all circumstances, without limitation.

Some commenters (e.g., OCOM, pp. 19-21; FFMC, pp. 7-8; Metropolitan, pp. 11-12) also contend that Maislin is not relevant here because it was decided under a

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* Id. at 2768, quoting Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908) ("Armour Packing"). The Court observed that compliance with the ICA's tariff filing requirements is "utterly central to the administration of the Act." Id. at 2769 (citation omitted). Compare MCI v. FCC, 765 F.2d at 1192 ("there can be no question that tariffs are essential to the entire administrative scheme of the [Communications] Act" (citation omitted)). According to the Court, "without [tariffs] it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." 110 S. Ct. at 2769. These statements apply to all unfiled rates, without regard to whether a different rate for the "same" service (MCI, pp. 19-21) is contained in the carrier's tariff.

"different statute" involving a "different agency." These claims are meritless. The statutory filing provisions that were at issue in Maislin are virtually identical to -- and provided the model for -- the provisions of Section 203 at issue here,* and courts construing the Communications Act thus treat decisions construing the parallel provisions of the ICA as controlling.** The ICC's authority relative to statutory filing requirements, moreover, is identical to the authority granted this Commission: each may "change" or "modify" these requirements in certain respects, but neither agency may exempt a carrier from the basic requirements of filing rates and adhering to them.*** For these reasons, it

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* Compare 47 U.S.C. §§ 203(a) and 203(c) with 49 U.S.C. §§ 10762(a)(1) and 10761(a). All of these provisions derive from Section 6 of the original ICA. See 24 Stat. 379, 380-81 (1887).

** See, e.g., ABC v. FCC, 643 F.2d 818, 820-21 (D.C. Cir. 1980); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234-35 (D.C. Cir. 1980); AT&T v. FCC, 487 F.2d 865, 873-74 (2d Cir. 1973). Indeed, in ABC v. FCC (643 F.2d at 822), the Court of Appeals applied to the Communications Act the Supreme Court's construction of the ICA articulated in Armour Packing and followed in Maislin.

*** Compare 47 U.S.C. § 203(b)(2) with 49 U.S.C. § 10762(d)(1). Both of these provisions derive from Section 6(3) of the original ICA. See 487 F.2d at 879. The variations in their texts identified by some commenters (e.g., USLD, p. 5 n.10; FFMC, pp. 7-8; OCOM, pp. 19-21) are trivial and immaterial, and do not warrant a different interpretation relative to the agency's authority to exempt carriers from the tariff filing requirement, as MCI v. FCC confirms.

could not be clearer that Maislin is fully applicable to the Communications Act and the Commission's authority thereunder.

B. Congress Has Not "Ratified" Forbearance.

Several commenters contend that even if Section 203 as originally enacted prohibited the Commission's assertion of forbearance authority, Congress has since "ratified" the Commission's contrary interpretation -- either by failing to enact legislation reversing that interpretation,* or by enacting TOCSIA (47 U.S.C. § 226).** These contentions are insupportable.

First, it is axiomatic that amendments by implication are strongly "disfavored."*** Indeed, the Supreme Court and the Court of Appeals have repeatedly held that Congress' failure to pass legislation disapproving an

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* See Cellular, p. 16 n.14; CompTel, pp. 11-13; MCI, pp. 23-45; OCOM, p. 4; Williams, p. 6.

** See Ad Hoc, p. 10-13; Cellular, pp. 15-17; CompTel, pp. 9-11; FFMC, pp. 9-12; GTE, pp. 23-24; Metropolitan, pp. 7-11; MCI, pp. 34-35, 42; OCOM, pp. 5-7; Sprint, pp. 11-14; Williams, pp. 2-6.

*** Natural Resources Defense Council v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988); see also Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) ("[c]ongressional inaction cannot amend a duly enacted statute").

agency's interpretation of a statute is irrelevant when that interpretation is contrary to the statute's plain meaning. The courts will consider ratification arguments only if they first conclude that the statute is ambiguous.*

These principles foreclose any ratification argument here, particularly in view of the Court of Appeals' holding that the plain language of Section 203 requires that "every common carrier shall file tariffs" (emphasis in original), and its conclusion that the Commission's contrary reading "departs from any plausible reading of the statute's text."** The prior judicial determinations that Section 203

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* See, e.g., Demarest v. Manspeaker, 111 S. Ct. 599, 603 (1991) ("where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction"); Leary v. United States, 395 U.S. 6, 24-25 (1969) ("re-enactment cannot save a regulation which contradicts the requirements of the statute itself") (citation omitted); Jones v. Liberty Glass Co., 332 U.S. 524, 533-34 (1947) ("the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions"); Ashton v. Pierce, 716 F.2d 56, 63 (D.C. Cir. 1983) ("Congress cannot by its silence ratify an administrative interpretation that is contrary to the plain meaning of the Act").

** MCI v. FCC, 765 F.2d at 1193. Maislin applied these same principles in holding that the meaning of the parallel provisions of the Interstate Commerce Act were so clear that the agency's contrary interpretation was entitled to no deference. See 110 S. Ct. at. 2768. In contrast, the "ratification" cases cited by the commenters involved statutes which were at least ambiguous, or where the Court agreed with the agency's interpretation of the statute as written.

and analogous statutes are unambiguous thus dispose of the contention that the Commission's erroneous interpretation has been, or can be, ratified by implication.*

Second, the suggestion that TOCSIA rendered the Commission's prior interpretation of Section 203 lawful is equally indefensible. The commenters assert that the tariffing requirement of TOCSIA is allegedly more "lenient" than Section 203, and that Congress must therefore have ratified the Commission's forbearance authority. This claim is expressly foreclosed by the statutory text.

Section 226(i) of TOCSIA, entitled "Statutory construction," provides:

> "Nothing in this section [TOCSIA] shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter."

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* See NLRB v. Radio and Television Broadcast Engineers, 364 U.S. 573, 585 (1961) (rejecting ratification argument where agency interpretation had been "adhered to in the face of consistent rejection by Courts of Appeals"). The ratification argument is particularly weak here because there is no evidence that Congress as a whole has ever focused on, or been made aware of, any Commission decision to excuse certain carriers from complying with Section 203. See TVA v. Hill, 437 U.S. 153, 192 (1978) (rejecting ratification where "there is no indication that Congress as a whole was aware of [the agency's] position, although the Appropriations Committees apparently agreed with [its] views"); SEC v. Sloan, 436 U.S. 103, 121 (1978). In no instance was there an explicit discussion by Congress of the merits or lawfulness of the Commission's decision or interpretation that common carriers need not file tariffs.

47 U.S.C. § 226(i).* Where Congress specifically indicates that a statute is not to be construed to change the law, that instruction is respected.** Section 203 is one of the "other sections of this chapter," and TOCSIA therefore cannot be invoked to change what would otherwise be the governing interpretation of Section 203. Section 226(i) thus explicitly precludes any argument that TOCSIA altered the obligations of common carriers under Section 203. Because forbearance was unlawful under Section 203 the day prior to the enactment of TOCSIA, Section 226(i) means that it remained unlawful.***

The arguments of some commenters based on TOCSIA's legislative history are irrelevant in view of the plain and unambiguous language of Section 226(i). In all events, the legislative history does not support their claims, but refutes them. It shows that Congress' entire focus in enacting TOSCIA was on a discrete segment of the industry -- operator service providers -- that it felt had

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* The Senate Report accompanying TOCSIA likewise stated that the bill "would make no change to existing law." S. Rep. No. 439, 101st Cong., 2d Sess., p. 25 (1990) ("Senate Report").

** <u>See</u>, <u>e.g.</u>, <u>Shearson/American Express, Inc. v. McMahon</u>, 482 U.S. 220, 237-38 (1987).

*** The argument that TOCSIA merely interprets (as opposed to altered) Section 203, even if supportable, is completely irrelevant. "It is the intent of the Congress that enacted [the provision] . . . that controls" its interpretation, not the intent or understanding of a subsequent Congress. <u>Teamsters v. United States</u>, 431 U.S. 324, 354 n.39 (1977). As discussed above, moreover, the argument that Congress altered Section 203 is foreclosed by Section 226(i).

been insufficiently regulated and were engaging in widespread abuses. The hearings, committee reports, and floor statements are devoted exclusively to the particular problems presented by that industry segment and to imposing new or additional requirements to address those problems.*

It is thus plain that all Congress intended to do in enacting TOCSIA (and all it did) was alter the regulatory policy toward operator service providers, and that it had no intention or desire to reach any broader issues affecting the telecommunications industry as a whole. And it was this understanding that Congress codified in Section 226(i) when it expressly prohibited courts or the Commission from construing TOCSIA to have any broader effect.

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* <u>See</u> Pub. L. No. 101-435, § 2, 104 Stat. 986 (1990) (Congressional Statement of Findings). Contrary to some commenters' claims, TOCSIA's filing requirement is not more "lenient" than Section 203; it is different. TOCSIA imposes several tariffing requirements that Section 203 does not. Indeed, for this reason, AT&T itself made the requisite additional filings prescribed by TOCSIA -- which it would not have had to do if that law were merely intended to apply to "nondominant" carriers in place of Section 203. For example, TOCSIA requires OSPs to file estimates of traffic volume by rate and the commissions they pay to aggregators, 47 U.S.C. 226(h)(1)(A), while Section 203 does not. In addition, Section 203 applies only to common carriers, while TOCSIA applies to non-common carriers as well. 47 U.S.C. § 226(a)(9). Congress studied the particular circumstances of this industry segment, and crafted a tariffing requirement specifically for that segment while leaving the law with respect to other carriers undisturbed -- an intention it codified in Section 226(i).

II. POLICY CONSIDERATIONS ARE NOT RELEVANT TO THE LAWFULNESS OF FORBEARANCE, AND ARE IN ALL EVENTS MISPLACED.

Because the legal and statutory case shows so clearly that forbearance is impermissible, it is not surprising that some commenters fall back on a wide array of "policy" considerations to argue for its retention. Carriers (e.g., Commonwealth, p. 5; ALTS, pp. 6-7; IRA, p. 3) point to the administrative and other costs imposed by tariff and other regulatory requirements. Customers (e.g., Ad Hoc, pp. 3-4) fear that enforcement of Section 203 could diminish their "buyer power" and thereby undermine their ability to obtain the services and prices that best meet their needs. Nearly all of these commenters contend that these and other alleged harms far outweigh the benefits of applying Section 203 to carriers which lack market power.

AT&T certainly shares customer concerns about the interference of unnecessary regulatory requirements with the operation of competitive market forces, and fully supports the Commission's efforts to eliminate or reduce regulatory requirements when consistent with the terms of the Communications Act.* In the context of the lawfulness

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* For example, unlike its competitors, AT&T supported the Commission's proposal in CC Docket No. 90-132 to permit interexchange carriers "to provide a limited amount of service on a private carriage basis." See In the Matter of Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd. 2627, 2644 (1990) ("IXC

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of forbearance, however, the short answer to all of these claims is provided by MCI v. FCC and Maislin. Each case holds unequivocally that only Congress may relieve common carriers from the tariff filing requirements currently embodied in Section 203, no matter how "reasonable" the agency's "assessment" of their relative merits.*

In all events, the concerns of some customers that enforcement of the rate filing requirement may impair competition or diminish their buyer power are misplaced. The simple fact is that carriers can and do meet the needs of users for customized services and discounted prices through filed arrangements, as demonstrated by AT&T's VTNS (Tariff 12), Competitive Pricing Plans (Tariff 15), contract carriage, volume discount and promotional offerings, etc. The intense competition that characterizes

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Competition NPRM"); see also Comments of AT&T, CC Docket No. 90-132, filed July 3, 1990, pp. 73-83. Some commenters (e.g., IBM, pp. 13-14, Fairchild, pp. 3-5) suggest that the Commission reconsider here its decision not to adopt its private carriage proposal. Although AT&T agrees that the Commission has the authority under the Act to adopt private carriage under the terms proposed in Docket No. 90-132, it would appear that private carriage is outside the scope of this proceeding, which involves common carrier services. The Commission can and should re-open Docket 90-132, or commence a new proceeding, to adopt rules permitting all interexchange carriers, including AT&T, to provide a portion of their services on a private carriage basis.

* 765 F.2d at 1195. See also Maislin, 110 S. Ct. at 2770-71; supra at 5-6.

the market will ensure that customers can obtain through tariffs such services and prices from all interexchange carriers, dominant and nondominant alike.*

Moreover, the assertion that only through the Commission's forbearance policy has customer bargaining power increased is especially questionable in view of the positions taken in court by some nondominant carriers regarding the validity of their unfiled rates. Notwithstanding their arguments here, MCI and Sprint have defended against suits by dissatisfied customers who claim that they were promised or are entitled to unfiled rates and terms by claiming that they are forbidden by law from charging and enforcing rates and terms other than those contained in their tariffs.** Indeed, Sprint has argued in

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* "One would think that a shipper who has the [buyer] power to require a carrier to reduce his [rates] could also require proof from a carrier that the negotiated rates had been filed before tendering the shipment." Maislin, 110 S. Ct. at 2769 n.12.

** See, e.g., Brookman & Brookman v. MCI (No. 86 Civ. 7040 S.D.N.Y.), MCI Motion for Summary Judgment, p. 13 ("The terms and conditions of the defendants' telecommunications travel services are governed exclusively by the applicable tariffs . . . The 'damages' plaintiff seeks to recover are the very rates which, by tariff and by law, MCI was obligated to charge") (filed December 17, 1990); id., Order at 3 ("plaintiff is legally foreclosed from claiming that a contract existed . . . which obligated MCI to charge rates inconsistent with the MCI tariff") (June 7, 1991); MCI v. Gorman, Wells, Wilder & Associates, Inc. (Civ. No. 90-6830 S.D. Fla.), MCI's Memorandum in Support of Motion to Dismiss Counterclaim, p. 5 ("to allow or to force a carrier to deviate from a tariff

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one such case that Section 203 "has never been amended [by Congress] to condone permissive forbearance," and that "[MCI v. FCC and Maislin] cast serious doubt on the validity vel-non of the FCC's forbearance policy to the extent that it permits voluntary detariffing of nondominant carriers."* Based on these incidents, it would appear that forbearance does not protect or advance the interests of customers, but rather allows certain carriers to offer non-tariffed deals to customers which the carriers can then abandon when and as it suits them. By eliminating any doubt in the market about the obligation of all carriers to comply with the filing requirements of Section 203, the Commission can protect customers from falling into this trap.

Finally, the concerns of carriers and other parties that the tariff requirement imposes unnecessary costs and delay are similarly misplaced. Nearly all of the costs and delays they describe are the result not of the tariff requirement, but of non-mandatory regulatory rules and

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even where the carrier has quoted to the customer a term different from the tariff is to give a preference to, and discriminate in favor of, the customer in question") (November 28, 1990); Redding v. MCI Telecommunications Corp. (No. C-86-5498), Order at 11 ("Section 203(c) of the Act requires common carriers, like SBS and MCI, to file tariffs with the FCC and to offer only the rates and services specified in those tariffs") (September 29, 1987).

* Richman Bros. Records, Inc. v. US Sprint Communications Co. (Nos. 90-5607, 90-5657 3d Cir.), Brief of US Sprint, filed October 31, 1990, pp. 27-28.

procedures such as advance notice of rate changes, submission of cost support, and inclusion in tariffs of information beyond that necessary to satisfy Section 203(a).* These requirements serve only to encourage abuse of the regulatory process by competitors in order to block or delay carrier-customer arrangements, with no countervailing public benefit.** The incentives and opportunities for this abuse are maximized by the current asymmetric application of regulatory requirements to AT&T alone among interexchange carriers, as the Commission has recognized.*** In contrast to tariffs, none of these other rules and procedures are mandated by the Act. The Commission therefore can and should eliminate or modify

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* A number of commenters (e.g., Williams, p. 12) propose that the Commission liberalize its rules under Part 61 to permit a carrier to cross-reference in one or more of its tariffs provisions contained in another of its tariffs. This proposal is reasonable and well-within the Commission's discretion, and should be adopted. Some commenters (e.g., CompTel, Litel) also propose that the Commission permit non-dominant carriers to file tariffs containing "banded" or "flexible" rates. Although a filed range of rates may be permissible under the Act, the Commission cannot decide the lawfulness of a tariff unless the tariff is actually before it. Any such ruling, moreover, should (indeed must) be applied equally to tariffs proposed by other carriers.

** Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5895 (1991) ("IXC Competition Order"); IXC Competition NPRM, 5 FCC Rcd. at 40 ("the tariff review process may be functioning not so much as a safeguard against unreasonable rates, but as a means by which firms may insulate themselves against competitive market pressures").

*** IXC Competition Order, 6 FCC Rcd. at 5895.

their application to all interexchange carriers, including AT&T. Only in this way will consumers be permitted to enjoy the benefits of a fully competitive market.

CONCLUSION

For all of the reasons set forth above, and in AT&T's Comments, the Commission should forthwith require all carriers to file tariffs in accordance with the mandatory provisions of Section 203.

Respectfully submitted,

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